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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-388

JOSEPHINE A. DILLON, Committee of
HILDA NADINE AMIDON, a legally
incompetent person,

Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF VIRGINIA

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Respondent, Potomac Hospital Corporation,[1] respectfully requests that the Petition for a Writ of Certiorari to the Supreme Court of Virginia be denied by this Court.

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[1]The Listing pursuant to rule 28.1 is stated in the Brief for Respondent in Opposition to Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the decision below rests upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether the rational basis test applies to state legislation retroactively abrogating accrued causes of action and defenses, and requires reversal?

3. Whether retroactive abrogation of accrued causes of action and defenses violates due process of law?

4. Whether matters of state public policy raise federal questions?

5. Whether the severability test applies to the statute in question and requires reversal of the decision below?

SUMMARY OF ARGUMENT

The Supreme Court of Virginia relied in this case entirely upon long established principles of Virginia law. No federal question is involved in this case.

The rational basis test does not apply to local, non-economic legislation which retroactively abrogates accrued causes of action and defenses.

The Virginia General Assembly in the present case retroactively eliminated the right of contribution among joint tortfeasors and the common law defense that release of one joint tortfeasor releases all. These rights had accrued to the Respondent at the time of the incident and

the Virginia Supreme Court was correct in holding that they could not, by later legislation, be retroactively abrogated.

Matters of public policy in Virginia do not raise constitutional issues.

The Attorney General's severability argument was not raised below and cannot be considered now for the first time. The severability argument involves no federal question. Both portions of the statute cited by the Attorney General were held unconstitutional and severing one portion of the statute will not change the result below.

ARGUMENT

I. THE DECISION BELOW DOES NOT REST UPON THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In its Brief Amicus Curiae, the Attorney General of Virginia asserts that

the decision below rests upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution. As the Brief in Opposition to the Petition for a Writ of Certiorari filed herein by Respondent demonstrates, the Supreme Court of Virginia in the present case cited and relied upon its settled jurisprudence in the area of retroactivity and not on principles of federal law. Neither the present case, Potomac Hospital Corporation v. Dillon, 229 Va. ___, 329 S.E.2d 41 (1985) nor the case it relied upon, Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984), cites or discusses the federal constitution. Each of the cases cited in Dillon and Shiflet interprets Virginia law and the effect to be given to a Virginia statute retroactively impairing substantive rights.

The Attorney General cites Reynolds v. Milk Commission of Virginia, 163 Va.

957, 179 S.E. 507 (1935), for the proposition that all interpretations of the Virginia Due Process Clause mirror the federal Due Process Clause. Reynolds, however, arose under Article I, Section 1 of the Virginia Constitution, titled "Equality and Rights of Men," and is not authority for interpreting the Virginia Due Process Clause.

The Attorney General also relies on Town of Danville v. Pace, 66 Va. (25 Gratt.) 1 (1874), for the same proposition. Pace did not arise under the Due Process Clause of either the federal or the Virginia Constitution. The Due Process Clause of the Virginia Constitution was not enacted until 1902, almost thirty years after the Pace decision. See HOWARD, **Commentaries on the Constitution of Virginia**, p. 189 (1974). Pace does not support the Attorney General's argument.

The Supreme Court of Virginia relied in the decision below solely upon principles of state law. Accordingly, no jurisdiction exists in this Court to review the decision.

II. THE RATIONAL BASIS TEST DOES NOT APPLY AND DOES NOT REQUIRE REVERSAL OF THE DECISION BELOW

The Attorney General asserts that the "rational basis" test of Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), Pension Benefit Guaranty Corp. v. R. A. Gary & Co., ___ U.S. ___, 104 S. Ct. 2709 (1984), United States v. Locke, ___ U.S. ___, 105 S. Ct. 1785 (1985), and National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co., ___ U.S. ____, 105 S. Ct. 1441 (1985), requires reversal of the decision below.

These cases apply the rational basis test only to national economic legislation. They do not support the

application of the rational basis test to state legislation retroactively abrogating substantive, accrued common law causes of action and defenses.

This Court stated the proper standard for review of legislation retroactively abrogating accrued causes of action and defenses in Ettor v. Tacoma, 228 U.S. 148 (1913), and Coombes v. Getz, 285 U.S. 434 (1932). These cases require affirmance of the result below.

Application of the rational basis test to § 8.01-35.1(D) would not produce a different result. The Attorney General cites the rationale for the enactment of § 8.01-35.1, but cites no rationale supporting the retroactive amendment contained in § 8.01-35.1(D).

III. RETROACTIVE ABROGATION OF ACCRUED COMMON LAW CAUSES OF ACTION AND DEFENSES VIOLATES DUE PROCESS OF LAW.

The Attorney General asserts that the "right of action" for contribution did not vest until the release was signed in July, 1983, citing First Virginia Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983), and therefore argues that no accrued rights were violated here. First Virginia Bank is not such authority. First Virginia Bank did not deal with contribution, but rather determined when the statute of limitations commenced to run for property damage arising from negligence under a statute of limitations which was repealed in 1977.

More importantly, the question of when, as a matter of state law, a litigant's entitlement to contribution arises, has been decided by the Supreme Court of Virginia, and reargument of this question is foreclosed here.

The Attorney General cites no case which upholds the constitutionality of a statute retroactively abrogating an accrued common law cause of action or defense. The Supreme Court of Virginia was correct in its holding in Dillon that the cause of action for contribution accrued at the time of the accident and could not subsequently be abrogated without violating due process of law.

IV. MATTERS OF STATE PUBLIC POLICY DO NOT RAISE FEDERAL QUESTIONS.

The Attorney General complains that the Dillon decision infringes upon the Virginia General Assembly's exercise of its legislative powers.

One of the essential functions of the judiciary is to review the constitutionality of legislation. The judiciary cannot perform this function without, on proper occasions, limiting the legislative power. To complain that the judiciary has

exercised its duty to strike down unconstitutional legislation adds nothing to the question concerning the constitutionality of the legislation in question.

The Attorney General also complains that the Dillon decision is contrary to the public policy of Virginia. The public policy of Virginia, however, does not favor unconstitutional legislation. Nor does the Dillon decision portend the disastrous expansion of litigation portrayed by the Attorney General. The decision applies solely to causes of action accruing before July 1, 1979. The decision does not apply to litigation in federal courts, regardless of the basis of jurisdiction. Mann v. H. K. Porter Co., No. 83-477 (E.D. Va., July 8, 1985).

The Attorney General's "legislative prerogative" and "public policy" arguments deal exclusively with the relationship between a state legislature and state judi-

ciary. No federal or constitutional issue is involved.

V. THE SEVERABILITY DOCTRINE DOES NOT APPLY AND DOES NOT REQUIRE REVERSAL OF THE DECISION BELOW.

The Attorney General suggests that this Court should sever the portion of the statute, § 8.01-35.1(A)(2) (discharging the settling tortfeasor for contribution), from the remainder of the statute, including § 8.01-35.1(A)(1) (providing that the non-settling tortfeasors shall not be discharged from liability to the claimant), and give retroactive effect to only the portion which abrogates a non-settling tortfeasor's right of contribution from the settling joint tortfeasors and creates a different measure of the non-settling tortfeasor's liability to the claimant.

This issue was not raised below and cannot be considered for the first time on

a Petition for a Writ of Certiorari. Tacon v. Arizona, 410 U.S. 351 (1973).

Amicus Petitioner's severability argument raises no federal question. Severability is a matter of statutory construction under state law. See Harrison v. NAACP, 360 U.S. 167, 178 (1959).

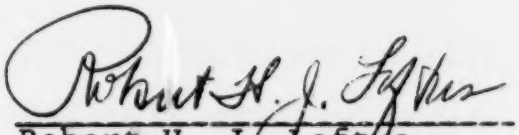
The Attorney General has misread the Dillon decision. The Supreme Court of Virginia held that both portions of the statute in question retroactively abrogated accrued, substantive rights (the common law cause of action of contribution, § 8.01-35.1(A)(2); and an accrued common law defense that release of one tortfeasor releases all, § 8.01-35.1(A)(1)). Both portions of the statute suffer from the same defect when applied retroactively. If either portion is unconstitutional, both are, for the same rule is violated by both. Both portions abrogate accrued,

substantive rights, and cannot be applied retroactively.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not issue.

Respectfully Submitted,

By: 

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CERTIFICATE

I hereby certify that on the 29th day of October, 1985, a true copy of the foregoing Brief for Respondent in

Opposition to Brief Amicus Curiae of the Commonwealth of Virginia in Support of the Petition was mailed, postage prepaid, to The Honorable William G. Broaddus, Acting Attorney General, 101 N. 8th Street, Richmond, Virginia 23219; Frank J. Ceresi, Esquire, 2300 South 9th Street, Suite 112, Arlington, Virginia 22204, Counsel for Petitioner; and to Robert R. Hatten, Esquire, Patten, Wornom & Watkins, 739 Thimble Shoals Boulevard, Suite 105, Newport News, Virginia 23606, Counsel for Virginia Brown, et al..

Robert H. J. Loftus